

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA**

Norfolk Division

BASF PLANT SCIENCE, LP,)
)
Plaintiff,)

v.)

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION,)

Defendant.)

C.A. No. 2:17-CV-503-HCM

COMMONWEALTH SCIENTIFIC AND)
INDUSTRIAL RESEARCH)
ORGANISATION, GRAINS RESEARCH)
AND DEVELOPMENT CORP., AND)
NUSEED PTY LTD.,)

JURY TRIAL DEMANDED

Plaintiffs-Counterclaimants,)

v.)

BASF PLANT SCIENCE, LP, AND)
CARGILL, INCORPORATED,)

Defendants-)
Counterdefendants,)

BASF PLANT SCIENCE GMBH,)

Counter-Counterclaimant.)

PROPONENTS' PROPOSED JURY INSTRUCTION ON MTEA

Proponents restate their objections made on the record on October 30, 2019, regarding the Court's proposed MTEA instruction. Proponents renew their request that the Court consider the following instruction.

INSTRUCTION NO. ____

On March 1, 2008, BASF and CSIRO entered into a contract, the Materials Transfer and Evaluation Agreement, or MTEA, in order to jointly evaluate each party's genes, promoters and constructs to see if there were options for further enhancing the levels of EPA and DHA in canola.

The terms of the contract include the following:

Results and any Intellectual Property subsisting in them will be owned, immediately upon creation, in the following way:

Joint New Results will be owned jointly by CSIRO and BASF Plant Science GmbH.

The following definitions are provided in the contract:

"Joint Results" are defined as "Results with respect to Joint Transformed Lines and Joint New Materials."

"New Materials" are defined as "constructs developed under the Evaluation incorporating Materials."

"Materials" are defined as "any genes, promoters and constructs of a Party identified in Schedule A and include copies, replicates, progeny or unmodified derivatives of the original Material. Materials include materials subsequently provided by a Party and Specified at the time of supply as being covered by the Agreement."

BASF contends that CSIRO breached the contract by seeking patent claims that recite *Brassica*. In order to succeed in their ownership claim, BASF Plant Science GmbH must show by a preponderance of the evidence that there was a legally enforceable obligation between CSIRO and BASF Plant Science GmbH; that CSIRO breached that obligation; that BASF Plant Science GmbH is entitled to a remedy as a result; and that the appropriate remedy is co-ownership of CSIRO's patents. CSIRO denies it breached the contract.

In order for a patent to be jointly owned under the MTEA, the patent claims must claim Joint Results. Joint Results include only results concerning constructs containing both CSIRO and BASF Plant Science GmbH genes developed under the Evaluation.

Under the MTEA, the parties were free to use information or materials in the public domain or independently developed by the party. Whether BASF Plant Science GmbH is a co-owner must be decided separately for each asserted patent because BASF Plant Science GmbH can be a co-owner of one or more asserted patents without being a co-owner of all of the asserted patents.

CSIRO denies it breached the contract. CSIRO also claims and has the burden of proving that BASF Plant Science GmbH failed to bring its breach of contract claims within the statute of limitations of five years after the breach occurred.

DATED: October 31, 2019

Respectfully submitted,

/s/ Richard Ottinger

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Certificate of Service

I hereby certify that on October 31, 2019 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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